In the Matter of

Matthew Stanley Quay

Before the Committee on Privileges and Elections of the Senate of the United States.

Brief and Argument

in Opposition to his Claim to a Seat

GEORGE WHARTON PEPPER
HAMPTON L. CARSON
GEORGE F. EDMUNDS
of Counsel

In the Matter of

Matthew Stanley Quay.

Before the Committee on Privileges and Elections of the Senate of the United States.

BRIEF AND ARGUMENT

In Opposition to his Claim to a Seat.

STATEMENT OF FACTS

Prior to March 3, 1899, M. S. Quay was senior United States Senator from Pennsylvania. On Tuesday, January 17, 1899, the Legislature of Pennsylvania began balloting for the purpose of selecting some one to fill the vacancy, which, in default of an election, would thereafter happen upon March 4th. Daily ballots were taken, in obedience to the provisions of the Act of Congress of July 25, 1866, and of the Pennsylvania Statute of January 11, 1867, but at no time during the session of the Legislature did Mr. Quay receive a majority of the votes cast. On March 3, 1899, the Legislature being still in session, Mr. Quay's term expired, and on March 4th a vacancy happened. The Legislature remained in session and took daily ballots until April 19, 1899, and on that day adjourned *sine die* without effecting an election. The total membership of the Legislature was 253. The last vote preceding adjournment was for Mr. Quay 93, and for his opponents 154. Immediately after the adjournment, to wit, on April 21, 1899, His Excellency, Wm. A. Stone, Governor of Pennsylvania, signed and delivered to Mr. Quay what purported to be a temporary appointment to represent the

State of Pennsylvania in the Senate of the United States until the next meeting of the Legislature. Up to the present time the Governor of Pennsylvania has not summoned the Legislature of the State for the purpose of filling the vacancy which happened as above set forth on March 4, 1899, although expressly required so to do by Section 4, Article II, of the Constitution of Pennsylvania.

The question presented to the Senate of the United States, which is the judge of the qualifications of its own members, is therefore the all-important question, whether the Senate will, by seating Mr. Quay, recognize the right of a Governor to make a temporary appointment in the case of a vacancy happening by the expiration of a previous term ; which term ended while an organized Legislature, competent to elect, was sitting and continued to sit, with ample opportunity to fill the vacancy, for a long time thereafter.

In view of the language and spirit of the Constitution of the United States, and in view of the decisions of the Senate rendered during the period of a century, adverse to the right of a Governor to appoint after a Legislature has had the opportunity to elect, it is obvious that the proposal that the Senate shall affirm the Governor's right to appoint must, if seriously insisted on, receive the most deliberate consideration on the part of those who are entrusted by the people of the United States with the responsibility of disposing of it. It is certain that the Honorable Senate of the United States will give to the question the consideration it demands.

It is submitted that in approaching the consideration of the question, it is proper :

First.—To examine the provisions of the Constitution of the United States applicable to the case, endeavoring to ascertain their true meaning in the light of the history of their composition and of just principles of interpretation.

Second.—It is proper to examine the precedents of the action taken by the Senate in similar cases which have come before it for decision.

Third.—As illuminating the above considerations, and as incidental to them, it is proper to consider the circumstances under which the Governor of Pennsylvania acted with reference to the provisions of the Constitution of the Commonwealth not inconsistent with the provisions of the Constitution of the United States.

These points may now be examined in order.

I.

The provisions of the Constitution of the United States relating to the Election of Senators—Their History and Interpretation.

Article I, Section 3, of the Constitution of the United States, is in part as follows:

"Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.

"Immediately after they shall be assembled in consequence of the first election they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the Legislature of any State, the Executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies."

When this language is analyzed, it appears in the first place that Senators are to be chosen by the Legislatures of the several States. It appears in the second place that there is equality of suffrage between the States represented in the Senate. It appears in the third place, that if vacancies happen in the office of Senator, by resignation

or otherwise, the Legislature alone can "*fill such vacancies.*" It appears in the fourth place that during the interval between the happening of a vacancy in recess and the next meeting of the Legislature the executive of a State has a right, but is not bound, to make *temporary appointments* until the next meeting of the Legislature, "which shall then fill such vacancies."

1. Historical Summary.

Turning to the record of the proceedings of the Federal Convention which framed the Constitution, it will be found easy to trace the gradual development of so much of the third section of Article 1 of the Constitution as is cited above.

The Convention having assembled on May 25, 1787, business began on the 29th with the submission by Mr. Randolph of fifteen propositions, which included a provision that members of the first branch of the National Legislature should be elected by the people, and that members of the second branch should be elected by those of the first out of a proper number of persons nominated by the individual Legislatures. There was also submitted a draft of a Federal Government (sometimes erroneously ascribed to Mr. Pinckney) providing that members of the first branch should be chosen by the people "and vacancies therein shall be supplied by the Executive authority of the State." The Senators (under this plan) were to be chosen by the first branch. There was to be no nomination by the Legislatures, but a choice of Senators was to be made from among the citizens of the States, and all vacancies arising from death or resignation were to be filled for the remaining portion of the term by the House. It thus appears that Mr. Randolph made no provision for the filling of a vacancy in the Senate and the so-called Pinckney plan, while contemplating that a State Executive should fill a vacancy in the House, made no provision for the exercise of such a right in the case of a vacancy in the Senate, it being understood that such a vacancy should be filled by the same authority with which rested the original responsibility of choice.

Both the Randolph and Pinckney plans provided for inequality of suffrage in both branches.

On June 7th, there was a unanimous vote in favor of Mr. Dickinson's motion, "that the members of the second branch ought to be chosen by the individual Legislatures."

On June 15th, Mr. Patterson submitted nine propositions providing that members of the second branch be chosen by the Legislatures, but making no mention of vacancies. He also contemplated inequality of suffrage in both branches.

On June 18th, Mr. Hamilton submitted, but did not move the adoption of, a plan involving the popular election of Senators, with a provision for an additional election by the people in case of a vacancy.

On June 19th, the Committee of the Whole was ordered, on motion, to rise and report nineteen resolutions founded on Mr. Randolph's proposition which included a provision that Senators should be chosen by the individual Legislatures. Unequal suffrage was contemplated, but nothing was said about vacancies in either house.

The insistence of the large States on unequal suffrage in both branches now threatened to cause a final disagreement. A compromise, however, was negotiated between Mr. Ellsworth and Mr. Sherman on behalf of the smaller States (with the assistance of Mr. Madison in the interest of harmony) and a committee was appointed of one from each State (Mr. Ellsworth representing Connecticut and Mr. Rutledge the Carolinas) to consider the ratio of suffrage in the Senate.

On July 5th, this committee reported in favor of equal suffrage in the Senate.

On July 26th, on the basis of the compromise above mentioned, the resolutions as agreed to, together with Mr. Pinckney's and Mr. Patterson's resolutions, were committed to a Committee of Detail (consisting of Messrs. Ellsworth, Rutledge, Wilson, Randolph and Gorham) which made its report on August 6th.

On August 9th, that portion of the report of the Committee of Detail which deals with the election of Senators, came up for discus-

sion. It will be noted that Mr. Ellsworth had successfully championed the rights of the smaller States and had succeeded in bringing about a compromise by which they gained equal representation. He was, of course, extremely anxious that the smaller States should be secure in their right to be represented at their own desire in the Senate under all circumstances, and therefore he was desirous of having the right to make temporary appointments in case of vacancies secured to the State executive. Accordingly when on August 9th Mr. Wilson made a general objection to the appointing power vested in a State executive, Mr. Ellsworth at once replied, "It is only said that the executive *may* supply vacancies. When the legislative meeting happens to be near the power will not be exerted."

It will be noted that the provision as brought in by the Committee of Detail was in the following words: "The Senate of the United States shall be chosen by the Legislatures of the several States. Each Legislature shall choose two members. Vacancies may be supplied by the executive until the next meeting of the Legislature. Each member shall have one vote."

In view of the point made by Mr. Ellsworth, it is clear at the outset that the word *may* was used advisedly, and is not equivalent to *shall*. This is all the more significant when it is noted that immediately before the paragraph thus dealing with the Senate, the Committee set forth the paragraph dealing with the House, which contained the provision that in case of vacancy, the Governor *shall* issue writs of election.

On September 12th the Committee on Style, Revision and Arrangement reported, and the third section of Article I read in their report just as it does in the Constitution, excepting that it did not contain the words "which shall then fill such vacancies."

On September 14th by an amendment whose author does not appear the last mentioned words were added. It is, therefore, a fact that the last touch added by the framers to make their meaning in the premises abundantly clear, took the shape of an emphatic declaration that it was the duty of the Legislature to fill vacancies, just as it was

the duty of the Legislature to make the election in the first instance. The right of the Executive had barely survived the criticism directed against its exercise, and was hedged before and behind with provisions which showed that it was regarded as a power to be exercised only where the Legislature had had no opportunity to elect—and even then to be used only at the option of the Executive.

2. Interpretation of the Language of the Constitutional Provision.

A. The Theory of the Composition of the Senate.

Turning again to the language of the Constitution, attention is called to the fact that the fundamental provision in regard to the composition of the Senate is contained in the opening sentence of the section. The provision is that the Senate "shall be composed of two Senators from each State, chosen by the Legislature thereof." It has accordingly been well said that "the Senate of the United States is composed of organized constituencies, the State Legislatures; to them belongs the power primarily of electing their Senators, when they are in session, at the happening of the vacancy, and at their first meeting when it happens in recess, and on them devolves the exclusive jurisdiction of filling such vacancies. Their right and authority to fill or supply vacancies which have been temporarily filled by executive appointment are as absolute and exclusive as was their power in an original election. When their power is brought into existence it must supersede all others, with this qualification, and that according to precedent, that they have a session to make the choice." (Minority report of the Committee on the Judiciary in the case of Samuel S. Phelps. The view of the minority prevailed with the Senate.)

In harmony with the view thus expressed, the section then deals with the division of Senators into classes. The last provision in the section is that which deals with the happening of vacancies, and it is only in order to make provision for an emergency which happens

during a recess of the Legislature that a subordinate right of appointment is vested in the Executive authority. It follows that, if in a given case there is a doubt whether the Governor should exercise the power in question, the doubt should be resolved against his right; for (to quote again from the same Report), "a Senator, under an Executive appointment, may or may not represent the political views of his State; he may be the mere personal favorite of the Governor. The Senate, as far as practicable, should be made to represent its constitutional constituency, and in this respect should preserve the Republican feature of our Union."

B. When a Vacancy "Happens" within the Meaning of the Constitutional Provision.

The language of the Constitution is, "if vacancies happen by resignation, or otherwise, during the recess of the Legislature of any State, the Executive thereof may make temporary appointments," etc.

Assuming a case in which the office of United States Senator becomes vacant while the Legislature of a State is in session, and the office remains unfilled during the remainder of the session and during the recess which follows it, the question is, Does such a vacancy happen during the session or during the recess, or both?

If this question were put to a layman with no other object in view than to obtain an intelligent and unbiassed opinion, it is hard to resist the conclusion that he would answer by saying that the vacancy happened during the session of the Legislature, and then only. If we resort to an exact analysis of the thought expressed by the word "vacancy," we find that the word has at least two meanings, dependent upon the verb which may be used in connection with it. If "vacancy" is used with a verb which denotes an occurrence in a moment of time, the mind is invited to a consideration of the fact of becoming vacant. If "vacancy" is used in connection with a verb which denotes the continuance of a condition, as, for example, the verb "exists," the thought which "vacancy" suggests to the mind is the duration of the state of being vacant. Now, the

framers of the Constitution, when they made use of the word "happen," selected the verb which of all others in the English language most strikingly indicates the occurrence of an event (usually an unexpected event), befalling in a moment of time. A "vacancy" *happens* when (and only when) the condition of vacancy *begins*. A "vacancy" *exists* as long as the state of being vacant endures. Note the interesting analogy suggested by the neighboring words in the section under examination, "during the recess of the Legislature." The word "recess" may have the double meaning which has been attributed to the word vacancy. A recess happens the moment the Legislature adjourns, and it happens only then. A recess endures from the time of adjournment until its next meeting. The framers of the Constitution, with that delicate sense of the fitness of words which characterizes the entire instrument, provided for the event which would befall in case a vacancy were to happen within the limits of the duration of the recess of the legislative body. We are, of course, aware that nothing amounting to demonstration is possible when a difference of opinion has arisen about the interpretation of a constitutional or statutory provision; but we submit with confidence that the considerations just advanced approach a demonstration that the framers of the Constitution meant to provide only for that which should occur when the Legislature was not sitting.

C. The Argument Based upon the Analogy of Executive Appointments.

In Section 3 of Article II of the Constitution of the United States, the following provision occurs:

"The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

In opposition to the interpretation urged above, it is often said that the right of a State Executive to fill a Senatorial vacancy which has occurred during a legislative session should be assimilated to the

admitted right of the President to fill up during the recess of the Senate vacancies that might have happened while the Senate was in session.

In answer to this contention, three points are confidently submitted.

(*a*) It is not admitted that any different interpretation should be placed upon the provision governing presidential appointments from that which has been contended for in the case of the State Executive. In point of fact, the history of the interpretation which has for some years been placed upon the presidential power is not a particularly creditable one and is not such as forms the basis of any strong argument from analogy. Originally it was never supposed that the President had a right to fill a vacancy which occurred when the Senate was in session. Prior to 1823, Mr. Sergeant, afterwards a judge of the Supreme Court of Pennsylvania, in his work upon the Constitution, construed the language in question as conferring no right upon the President except where the vacancy occurred in recess. In 1823, the then Attorney General, Mr. Wirt, while conceding that this interpretation was most accordant with the literal sense and natural import of the words of the Constitution, gave it as his opinion that reasons of public expediency required the President to fill up vacancies left unfilled at the adjournment of the Senate to prevent the inconveniences which would result if there should be no one who could discharge the duties of the office in question. In the edition of Mr. Sergeant's work published after Mr. Wirt's opinion, the author does not change his view in consequence of it. Even after so distinguished an Attorney General as Mr. Taney had concurred in Mr. Wirt's opinion, Judge Story, in his commentaries adhered to the text of Mr. Sergeant. The same statement is true of Chancellor Kent who made a note of Mr. Wirt's opinion, but did not modify his text in accordance with it. In 1841, Mr. Attorney General Legaré gave a qualified opinion to the same effect as Mr. Wirt. In 1845, Mr. Attorney General Mason gave a

contrary opinion in the case of the appointment of judges for Iowa and Florida, but afterwards in 1846, in the matter of the appointment of a deputy postmaster at Buffalo, he suffered himself to be guided by the previous opinions and, adopting the somewhat apologetic language of Mr. Wirt, said that in acquiescing in their conclusions he was "doing no violence to the language of the Constitution." Mr. Cushing considered the matter incidentally in 1855, and during the ensuing seven years other Attorneys-General concurred in the views of their predecessors. In 1862 Mr. Attorney-General Bates, upon the question of the power of the President to fill a vacancy in the bench of the Supreme Court, which had happened during a session of the Senate, used the following significant language: "If the question were new, and now for the first time to be considered, I might have serious doubts of your constitutional power to fill up the vacancy by temporary appointment in the recess of the Senate." He, however, deferred to the practice and followed the opinions of some of his predecessors. In 1868, in a most elaborate opinion reported in Volume 8 of the Internal Revenue Record at pages 137–145, Judge Cadwalader, of the District Court of the United States, reviewed all the authorities, examined the opinions of the Attorneys-General and rendered the only judicial decision upon the subject which we have been able to find. He thus sums up the state of the authorities: "The existence of the power in question has not been legislatively recognized, has been denied by the Senate, has been practically asserted by Presidents only, and has not been exercised without constantly recurring suggestions by them of doubts of its existence under the Constitution; opinions of Attorneys-General have been its only support; and in these opinions other jurists of eminence have not concurred." As illustrating the antagonism which this usurpation on the part of some Presidents has excited, note may be made of the Act of Congress of February 9, 1863 (Revised Stats., 1768), providing that no money should be paid from the United States Treasury as salary to any one appointed to fill a vacancy which had occurred while the Senate was in session.

Since that time presidential appointments have been made, but the practice has always excited criticism and opposition. At no time was this opposition more pronounced than when President Cleveland, after his appointees to various offices had been rejected by the Senate, insisted upon reappointing those who were *personae non gratae* to the Senate as soon as that body had risen; and the same thing has occurred in the administrations of other Presidents. An extension of this abuse of presidential power may, in the future, lead to a serious curtailment of the rights of the Senate as vested in that body by the careful provisions of the Constitution.

(*b*) Even if it be conceded that the presidential power of appointment, under the circumstances in question, is the result of an administrative necessity for such an interpretation of the constitutional provision, it will be noted that the circumstances of the case are radically different from those which exist in the case of a senatorial vacancy. The presidential right of appointment applies to offices in many instances occupied by single individuals, so that if a vacancy continues the duties of the office cannot be discharged at all. In the case, for example, of the collector of a large port, it is easy to imagine the great public inconvenience which would result if the failure of the Senate to confirm an appointment were to involve a vacancy of the office until the next session of Congress. In the case of the Senate (however desirable it may be that its membership should be kept full), it is extremely unlikely that legislative inaction will seriously hamper the prosecution of national business: for the States are now many and the Senators are twice as many; and it is certain that the several Commonwealths will not long permit their Senatorial representation to fall below its normal strength.

(*c*) As a further distinction between the case of presidential appointments and the case under discussion, it will be observed that the appointment of administrative officers is under the Constitution primarily an executive function. The function of the Senate is that of an advisory and consenting body. In the case of the election of

the United States Senators the responsibility is cast by the Constitution upon the Legislatures of the States, and the whole theory of the composition of the Senate demands that the people of the States shall act through their legislative representatives. To assimilate the subordinate right of the State Executive to the primary right of the President of the United States is to invert the analogy and to reason backwards.

D. The Argument that the Senate should be Kept Full.

It is sometimes suggested that the right of a Governor to appoint whenever he finds a vacancy existing, and a Legislature not in session, may be vindicated upon the principle that the Senate must always be kept full. The argument is that the importance of senatorial business is such that no vacancy should be allowed to continue; and that the State Executive, in making a temporary appointment, is really acting primarily in the interest of the Senate, and only incidentally in the interest of his own State. It is important to note (in the light of the historical data examined above) that the right of the Governor was not conferred upon him out of consideration for the convenience of the Senate, but in order to give to the smaller States an additional assurance that they might always be represented in the Senate if they wish to be. It is also important to note that the language of the Constitution is precisely adapted to the expression of this thought. The provision is that the Governor "*may*" make temporary appointments. If the intention of the framers had been to insure the constant presence in the Senate of a full quota of Senators, it would have been provided that the Governor *shall* appoint whenever and however a vacancy exists. To say that the appointing power is to be ascribed to considerations of national policy is to admit that the policy in question may be frustrated by the mere decision of a Governor not to appoint. This is to impute to the framers a looseness of thought which is altogether out of harmony with what we know of their deliberations and in striking contrast with all the other provisions of the Constitution.

It may be said, however, that for the good of the State as well as for the good of the Senate, the Senatorial representation from a State must be kept full. The answer to this contention is conclusive. It is of greater importance to the State that those who sit as Senators shall really be the choice of the legislators elected by the people than that the Senatorial seats shall be kept full at all hazards and without regard to the source from which the occupants derive their title. It is better for a State to have for a while no Senatorial representative, or only one, than to be subjected to the dangers that will surely ensue if the appointing power of the Governor is extended beyond the very letter of the limitation. If, in accordance with the present settled law of the Senate, a Governor has no rights when the Legislature has had an opportunity to elect, he has no motive in working to prevent an election by planning to bring about a deadlock. Once concede to the Governor the right to appoint when the Legislature has had its opportunity but has not acted, and there is straightway created a powerful incentive to the formation of a "Governor's party" to wield the balance of power and throw the choice of Senator into the hands of the Executive. If such a condition of things is contemplated even for a moment, it will be seen to be altogether at variance with the constitutional theory of the composition of the Senate, and absolutely abhorrent to the expressed opinions of the Fathers. They conceived of the Governor as the holder of a substitutionary right, to be exercised only in an emergency. They would have shrunk from the suggestion that their language might be so construed as to enable him to become a political schemer, plotting to prevent the Legislature from exercising its constitutional functions.

3. The Senate, in Passing Upon the Qualification of its Own Members, Exercises a Judicial Function.

Section 5, Article I, of the Constitution of the United States provides:

"Each House shall be the judge of the elections, returns and qualifications of its own members."

Deriving its own existence from and maintaining that existence under the provisions of the Constitution, the Senate is not at liberty to pass upon the qualifications of its membership upon general principles of good fellowship. It is not a social club, where members are to be chosen because of their companionable qualities, their virtues or their amiabilities. "The right of a Senator to a seat," said Senator Spooner, in the Corbett case, "depends entirely upon a question of constitutional law, and I think all Senators who do me the honor to listen will agree with me that into the decision of that question there may not rightfully enter any complications of public policy or of personality." (Congressional Report, February 24, 1898, page 2119.)

While it is true that the Senate is not in every technical sense of the term a judicial body, yet it is wholly and solely that under the provisions above quoted and is certainly bound by the language of the Constitution as expounded by itself in similar cases, or in cases the facts of which bear so close a resemblance to the case under consideration as to furnish a fair basis for reasoning from analogy. Precedents are not to be lightly overturned. Action must be taken solely on principle. No case of hardship exists to-day that is any greater in its consequences or more distressing in its features than those that have been disposed of by the Senate in time past. No special facts can be alleged here which can exempt this case from the operation of the principles of construction which have been herein contended for. There is no reason that can be suggested why the present case should not be decided in harmony with the precedents represented by the decisions of the Senate in cases that have already come before it. To a consideration of these precedents attention is next invited.

II.

Precedents of the Action Taken by the Senate in Similar Cases which have come Before it for Decision.

Much has been said and written in the discussion of the question whether the doctrine of *stare decisis* is applicable to senatorial deliberations. Perhaps no more satisfactory answer can be given to the question than to point to the records of the Senate Election Cases which have come up for decision during the last hundred years. Whatever the *theory* may be, the *fact* is that the Senate has shown the most commendable zeal in trying to decide cases upon principle and in working out rules of action as distinguished from arriving at decisions by a consideration of the personal or political element in each particular case.

An examination of the precedents discloses the fact that the questions presented to the Senate for decision group themselves naturally into four classes: (1) questions relating to the cause of vacancy; (2) questions relating to the time of the occurrence of the vacancy; (3) questions relating to the time of the Governor's appointment; and (4) questions relating to the limitation of the term of a Governor's appointee.

1. *Cases in which the question relates to the cause of vacancy.*

Vacancies may occur, generally speaking, in three ways: by death, resignation, or by the expiration of a prior term. In the case of vacancies caused by the expiration of a prior term, it may chance that the happening of a vacancy can be foreseen (which is the usual case), or that it cannot be foreseen. Again (as for example, where an old State Constitution is succeeded by a new one), a state of affairs may exist in which the vacancy, although foreseen, cannot be provided for, because no Constitutional Legislature exists competent to fill it. No difficulty is presented where the vacancy is caused by a casualty. It has always been plain that in such a case the Governor's right to appoint exists, provided the casualty happens

during a recess of the Legislature. Where the vacancy is caused by the expiration of a term, and the happening of the vacancy in recess could be foreseen, it was held in the following cases that the Governor's right to appoint existed: Uriah Tracy, 1801 (Taft, page 3); Samuel Smith, 1809 (Taft, page 4). In the following cases, it was held that the Governor's appointee was not entitled to his seat; James Lanman, 1825 (Taft, page 5); Lee Mantle, 1893. In the case of John B. Allen and Asahel C. Beckwith the occurrence of the vacancy could be foreseen; but the cases were not pressed to a vote, as the Senate decided against the right of Mantle to take his seat. A similar decision was reached in the case of Henry W. Corbett, 1898.

It has happened only once that the occurrence of a vacancy by the expiration of the term could not be foreseen by the Legislature. This was in the case of Ambrose H. Sevier, 1836 (Taft, 7), who drew a short term by lot, the fact not being known to the Legislature, and he was held entitled to sit upon the Governor's appointment.

It has happened twice that a change in the State Constitution has so operated as to deprive the Legislature which last sat before the occurrence of the vacancy from exercising the right to provide for the filling it. In these cases (the vacancy occurring during a recess of the Legislature), it was held that the Governor's appointees were entitled to sit. Case of Charles H. Bell, 1879 (Taft, 26), and Henry W. Blair, 1885 (Taft, 36).

Summing up the cases in which the vacancy has been caused by the expiration during a recess of the Legislature of a prior term where the occurrence of the vacancy could be foreseen, it appears that in the first two cases the right of the Governor to appoint was upheld, and in the last five cases (including for this purpose the Allen and Beckwith cases) the right was denied. Where the vacancy could not have been foreseen, or (if foreseen) could not have been provided for, the Governor's appointee was held to be entitled to his seat.

Quite apart, therefore, from other considerations, it appears that in order to seat Mr. Quay, it would be necessary for the Senate on

this point to reverse a rule of action which has been recognized for seventy-five years.

2. *Cases in which the question relates to the time of occurrence of vacancy.*

Whatever may be the true interpretation of the phrase "happen during the recess of the Legislature," it is a fact that the Senate has never once been called upon to vote upon the right of a Governor's appointee where the vacancy occurred during a session of the Legislature. In only one case has it been thought worth while to bring such a question before the Senate. This was in the case of John B. Allen, in 1893, when the matter was dropped without being pressed to a vote. In every other case in which there has been a contest, from 1794 to 1898, the vacancy sought to be filled by the Governor's appointment occurred during the recess of the Legislature. It has often happened that Senatorial seats remained unfilled at the beginning of terms, by reason of non-election by the Legislature. Among the cases is that of a vacancy in the office of Senator from Pennsylvania from March 4, 1855, to January 18, 1856. In none of these cases did the Governor presume to exercise the right which he has claimed in the case of Mr. Quay. If there were nothing more in the case than this, there would be a sufficient ground upon which to ask the Senate to pause before yielding its assent to a claim of right upon the part of a State Executive, the exercise of which may be fraught with danger to the several States, and even to the Senate itself.

3. *Cases in which the question relates to the time of the Governor's appointment.*

The Governor may assume to exercise the right of appointment either before the vacancy has occurred, or after it has occurred. In either case, it may happen that there has been an opportunity for legislative action between the occurrence of the vacancy and the Governor's appointment, or it may happen that there has been no such opportunity.

In the following four cases the Governor has claimed the right to appoint in anticipation of a vacancy, no opportunity occurring for legislative action: Uriah Tracy, 1801, *supra;* James Lanman, 1825, *supra;* Ambrose H. Sevier, 1836, *supra;* Horace Chilton, 1891 (Taft, 48). The Governor's appointee was permitted to take his seat in every case except the Lanman case. The decision in the Lanman case is sometimes said to have been based upon the denial of the right of a Governor to make an appointment in anticipation of a vacancy. It is more probable (as suggested above) that the decision was based upon a denial of his right to fill a vacancy which could be foreseen.

In the following nine cases the Governor claimed a right of appointment after the occurrence of a vacancy when there had been no opportunity for legislative action in the interval: Samuel Smith, 1809, *supra;* Robert C. Winthrop, 1851 (Taft, 10); Archibald Dixon, 52 (Taft, 13); Samuel S. Phelps, 53 (Taft, 16); Jared W. Williams, 1853 (Taft, 23); Charles H. Bell, 1879, *supra;* Henry W. Blair, 1885, *supra;* Lee Mantle, 1893, *supra;* Henry W. Corbett, 1898, *supra.* In all these cases, as far as the mere time of appointment is concerned, the act of the Governor was regarded as a legitimate exercise of the executive power of appointment. In the Mantle and Corbett cases, however, the appointee was held not to be entitled to his seat on the entirely independent ground that the vacancy was foreseen by the Legislature and could have been provided for by anticipation.

In only two cases does it appear that an executive appointment was made after the vacancy had occurred when there had been an intervening opportunity for legislative action. One of these was the Allen case already referred to as not having been pressed to a vote. The other case was the first contested case that ever came before the Senate, that of Kensey Johns, 1794 (Taft, 1). In that case the Senate rejected the Governor's appointee by a vote of no less than 20 to 7. Among those who voted on this case were five men who had sat in the Federal Convention which framed the Constitution. Ellsworth, King, Langdon and Martin voted against the right of the

claimant; Gouverneur Morris was the only one of the five who voted in his favor. In so voting he was true to the principles for which he had contended in debate—that the Senate should be an aristocratic body selected by appointment and not by election and to be removed as far as possible from the people of the several States.

It, therefore, appears that if Mr. Quay is seated, the Senate in seating him will be departing from its own construction of the Constitution of a century's standing and from a precedent established by a decisive vote cast by men who had abundant opportunity to familiarize themselves with the views of those whose language we are construing. The eighteenth century closed with a senatorial decision which vindicated the right of the State Legislature and put a wholesome restraint upon the action of the State Executive. It is to be hoped that the end of the nineteenth century will not witness a reversal of this wise decision.

4. *Cases in which the question relates to the limitation of the term of the Governor's appointee.*

The Governor may appoint for a term which lasts until a date certain falling within the recess; or he may appoint until the next meeting of the Legislature. In the case of Archibald Dixon, 1852, *supra,* it was held that the Governor might limit his appointment to a date within the recess, if that date happened to be the beginning of a term of a Senator previously elected by the Legislature. If the Governor appoints for a term to last until the next meeting of the Legislature, it may happen that the next Legislature will elect a successor to the Governor's appointee, or that it will sit, fail to elect and adjourn. In the former event, it has been held in two cases (Samuel Smith and Robert C. Winthrop, *supra,*) that the appointee is entitled to sit during the session of the Legislature until the election of his successor and until the acceptance of the successor has been notified to the Senate. In the latter event it has been held in two cases (Samuel S. Phelps and Jared W. Williams, *supra,*) that immediately upon the adjournment of the Legislature without

electing a successor, the term of the Governor's appointee is at an end. In other words, the Senate, after solemn and mature deliberation in these two cases, emphasized the principle that the Governor's right is subsidiary and substitutional merely; and that when the Legislature has once had an opportunity to elect and has, by adjourning without election, made it certain that the election cannot take place, the right of an appointee is at an end.

Attention is invited to the significance of these precedents in connection with the case of Mr. Quay. If, during the recess of the Legislature of Pennsylvania, occurring in 1898, Mr. Quay had been appointed to fill a vacancy happening by the death or resignation of a predecessor, he might have taken his seat in the Senate of the United States in the fall of 1898, and he might have continued to sit while the Legislature of Pennsylvania was in session during the winter and early spring of 1899. Immediately upon the adjournment of the Pennsylvania Legislature the term of Mr. Quay as the Governor's appointee would have come to an end, in obedience to the precedent in the Phelps case and the Williams case. Those who now advocate the seating of Mr. Quay would be compelled to contend that the Governor, by a new appointment, might nullify the decision in the Phelps and Williams cases and continue his appointee in office from year to year as long as the Legislalature failed to elect. Surely, no result could be more inconsistent with the deliberate decision of the Senate in the Phelps case and the Williams case. It is earnestly submitted that this simple statement of the effect of the contention made on behalf of Mr. Quay is one of the strongest arguments that can be made against his claim of right to a seat in the Senate.

The precedents which have been examined make it clear that the seating of Mr Quay would involve the recognition of the right of a Governor to fill a vacancy caused by the expiration of a term when the vacancy can be foreseen—a return to the position abandoned seventy-

five years ago; that it would involve a recognition for the first time in the history of the Senate of the right of a Governor to appoint when an opportunity for legislative action has intervened; and that it would involve the abandonment of the wholesome principle that a Governor has no rights whatever after the adjournment of a Legislature in respect of a vacancy which the Legislature has had an opportunity to fill and especially one that did not begin during a recess of the Legislature.

It is true that in the discussion of these Senate election cases many distinguished Senators have contended for results which the Senate finally refused to reach. This was notably the fact in the Mantle case already referred to. In that case the Senate rejected the report of the majority of the committee, and refused to seat the Governor's appointee, although it should seem that the report of the majority made the strongest possible presentation of what we firmly believe to be the wrong side of the question under discussion.

We beg respectfully to refer to some of the considerations advanced in the report of the majority of the committee in the Mantle case, and to submit that they are not well founded.

We submit *First*, that while it is true that the purpose of the Constitution is that all of its parts should be in active and effective operation at all times, it is also true that the Constitution itself most carefully provides for the occasions and the methods by which this should be accomplished. We think it clear that the framers of the Constitution especially designed, in respect of representatives of the people and of the States, that the choice of such representatives should always be in the hands of the people and of the Legislatures of the States, which Legislatures immediately represent the people in their primary capacity, and that it was not designed to leave it in the power of the Executive of a State to make selections, except in the precise and occasional instances in which, when a vacancy should come into existence, he is given the right to make a "*temporary* appointment" until the next meeting of the representatives of the

people. The Governor of the State was not given power to *fill* the vacancy at all. The language of the clause repels the idea. The Legislature when it next meets after the vacancies have come into existence shall fill the vacancies. The vacancy spoken of must of necessity always be for a definite period of time, namely, from its beginning to the end of the term to which it belongs or to the time when the Legislature fills it. We believe this proposition has never been questioned. The clause of the Constitution above referred to in respect of Senators stands in marked contrast with the clause respecting the power of the President, which in express terms gives him the power to "*fill up all vacancies*," etc.

Second.—The clause in the Constitution respecting members of the House of Representatives is entirely different from that in respect of Senators. It is not limited to any parricular period of time as in the case of Senators—"during a recess of the House"—but it is so framed that whenever vacancies happen the executive of the State is *commanded* to issue writs of election to fill such vacancies; while in the case of Senators, the State Executive is given authority to make temporary appointments. Whether he should do so or not was left to his discretion in the state of circumstances that might exist in each particular case. It will be perceived, therefore, that it was industriously provided in the case of Senators that the Executive authority should be kept within the narrowest possible limits. Had the idea of keeping the offices full been either the fundamental or even the influential one, the clause would have been framed to read that "all vacancies in the office of Senator which may exist at any time shall be filled by the Executive of the State by granting commissions to expire at the end of the next session of the Legislature." Is it not a just conclusion, then, that the intention was to keep out of the hands of any one man holding the office of Governor, the power to send members to the Senate, to the last practicable degree? A vacancy in an office is a unit. The same vacancy, therefore, can never "happen," "take place," "occur," or "come to pass" but once. When it has

begun it has happened, it has taken place, it has occurred, it has come to pass, and it cannot possibly, in the nature of things, do any one of them again.

Third.—The use in the Constitution of the plural word "vacancies" is, it is submitted, merely the distributive equivalent of the words "if a vacancy shall happen." It was a mere matter of convenience of style. In the sentences immediately preceding the plural form is invariably used—"Two Senators," "Three classes," "Seats of the Senators." It was thought convenient that "vacancies" should be used instead of "vacancy," and "appointments" instead of "appointment." To assign any other significance to the plural form would imply, as indeed the language of the report in the Mantle case appears to state, that the Executive of the State should have the perpetual power of appointment, in which case it would only be necessary for him to have a small number of the members of the Legislature adhering to his interests, who, by voting for a third candidate, could prevent a majority from being obtained for any other. Such a government would not be a "government of the people, for the people and by the people," but would, so far, be a government by the Executive, who, in States where a plurality elects, might continue to be the choice of only a minority of the citizens.

These considerations, doubtless, were among those that influenced the Senate in rejecting the report of the majority of the committee in the Mantle case in spite of the ability and ingenuity with which the views of the majority were presented. As it is, the decision of the Senate in that case takes its place in the unbroken line of precedents which set well-defined limits to the power of the State Executive.

Upon the authority, then, of the Senatorial precedents, as well as upon just principles of constitutional interpretation, it is confidently submitted that Mr. Quay has not a vestige of right to the seat which he claims.

III.

The Provisions of the Constitution of Pennsylvania Requiring the Governor to Convene the Legislature to Fill a Senatorial Vacancy.

The Constitution of the State of Pennsylvania which came into operation in 1874 contains the following provision in Section 4 of Article II.

"The General Assembly shall meet at twelve oclock noon on the first Tuesday of January every second year, and at other times when convened by the Governor, but shall hold no adjourned annual session after the year 1878. In case of a vacancy in the office of United States Senator from this Commonwealth in a recess between sessions, the Governor shall convene the two houses by proclamation on notice not exceeding sixty days to fill the same."

It will be seen that this section provides for every vacancy, no matter when it happened or how it happened. It may be affirmed we think, without danger of contradiction, that it was within the absolute competence of the people of Pennsylvania to require the Governor to convene the Legislature on any occasion whatever which they might chose to provide for. The Constitution of the United States expressly authorizes each State to regulate the time of electing Senators and Representatives, subject to the power of Congress to alter such regulations; and it especially recognizes that the next meeting of a Legislature, after a vacancy comes into existence, is to fill it.

The above quoted Section of the State Constitution is therefore in entire harmony with the Constitution of the United States and in no manner interferes with the authority given by it to the Governor. The Constitution of the State, then, has required the Governor in all such cases as this to convene the Legislature for the purpose of filling the vacancy. He has for three-quarters of a year disobeyed this

requirement and insists that his commission shall give authority to his appointee to represent the State in the Senate, in defiance of the positive provisions of its constitution. It is believed that no case can be suggested which illustrates more strongly than this the danger of the latitudinary construction of the Constitution of the United States claimed on behalf of the Governor.

If it is urged that the duty of the Governor to convene the Legislature is limited to the case of vacancies happening in recess where the Legislature has had no opportunity to act, a sufficient answer to the suggestion is found in the explicit language of the Constitution and in the circumstances which led to the adoption of the provision in question.

In the first place it will be noticed that the significant word "happened" does not appear in the provision. The words are, "in case of a vacancy in a recess between sessions," the language is broad enough to include all vacancies irrespective of their cause or the time of their occurrence. Turning to the debates in the Constitutional Convention, we find that the insertion of the provision in question was moved by Mr. Buckalew, at one time a Senator of the United States, who has taken pains to make a clear exposition of the provision in his authoritative work upon the Constitution of Pennsylvania, at page 33, he uses the following language:

"The clause relating to senatorial vacancies was proposed and agreed to on second reading. (5 Conv. Deb. 350.) The word 'casual' before the word 'vacancy,' in the amendment as adopted, was afterwards struck out, so that the provision should apply to vacancies occasioned by regular expiration of senatorial terms, as well as to others.

"The vacancies provided for in this clause, are evidently those which may exist in a recess between sessions, whether they shall happen *to occur* during a recess or not. It follows that if a vacancy shall exist during a legislative session and shall not be filled before the adjournment, it will be the duty of the Governor, in recess, to convene the Legislature to fill it.

"The power of the Governor under the Constitution of the United States to fill a senatorial vacancy, is not at all interfered with by this section, which only provides for bringing the Legislature into session at fit times. It would, however, be an abuse of power, or rather a violation of the whole spirit and purpose of this section, for the Governor to delay calling a special session, in order to continue the senatorial service of a person appointed by him to fill a vacancy."

Senator Buckalew's reference to the omission of the word "casual" makes it abundantly clear that the framers of the Pennsylvania Constitution desired to insure the election of a United States Senator by the Legislature in every contingency that could possibly happen. A reference to the report of the debates in the Constitutional Convention reveals the fact that the provision in question was inserted to limit the duration of the term of a Governor's appointee, which otherwise would have been unduly extended by the adoption of the system of biennial legislative sessions. The remarks of Senator Buckalew in support of the resolution embodying the provision in question are here printed in full. At a subsequent period of the debate the word "casual" was stricken out as already explained. "The Constitution of the United States provides for the election of United States Senators by the Legislature. Under the provision of biennial sessions it may happen that a Governor may have to appoint a United States Senator for nearly two years. It was never the intention of the provision in the Constitution of the United States that he should have the appointment of a Senator for a long period of time, but that simply in the case of an emergency he might fill a vacancy in the United States Senate by appointment until the Legislature should meet. It has been the usual habit in the Legislatures of the different States to meet every year; but as we have ordered biennial sessions, I think it would be proper to provide an amendment by which, in case of a vacancy in the United States Senate the Governor should convene in session the Legislature for the purpose of electing a Senator to fill that vacancy. Meanwhile,

he would fill it by appointment under the Constitution. I think, sir, that this amendment will relieve one of the principal objections to biennial sessions of the Legislature, as we have now voted that our Legislature shall meet only biennially. There is another objection which my amendment will correct besides the question of filling seats in the Senate, which is this: The election by the Legislature itself may be held one whole year before the seat is to be filled, on the expiration of a regular term. It is a great inconvenience that the Legislature shall be called a whole year beforehand to fill a seat in the Senate. This is one of the difficulties which we have in establishing constitutional provisions providing for sessions of the Legislature. I know that in many of the States of this Union this has constituted a serious objection in practice to biennial sessions, and, of course we shall be obliged to incur that inconvenience. A seat in the United States Senate ought to be filled by the Legislature near the time when the vacancy occurs. I beg leave to say that I understand we have another provision in the Constitution that the Legislature, when convened by the Governor in special session, shall be confined to the subject upon which he calls them together, so that when the two Houses are called together to elect a United States Senator, under the provisions of this amendment, it will be a short session, and held at very inconsiderable expense.''

If, then, we sum up the effect of the provisions of the Constitution of Pennsylvania, a summary statement may be made somewhat as follows:

The United States Constitution says that the Governor *may* —not shall—appoint until the next meeting of the Legislature.

The Constitution of Pennsylvania says that he *shall* convene the Legislature on not more than sixty days' notice whenever a vacancy exists. The duty of the Governor was made *imperative* by the Constitution as soon as the vacancy described in the Constitution came to be one existing in the recess of the Legislature.

The time when that meeting should have been held has long since passed. The issuing of the commission to Mr. Quay was, therefore,

a flagrant violation of the Constitution of Pennsylvania. It was an act which the Constitution of the United States *did not require him to do.* Is the Senate of the United States, under any construction of the word "happen," bound to recognize such an usurpation as lawful and approve it by affirming the validity of such an appointment? Had the Governor done his duty, his appointment and his right to appoint would have long since lapsed. Applying the principles upon which Courts have always acted in analogous cases, it is insisted that the present commission is absolutely void.

In conclusion, we respectfully submit that this honorable committee should report that Mr. Quay is not entitled to the seat which he claims, because in appointing him the Governor of Pennsylvania exceeded the power conferred upon him by the Constitution of the United States, disregarded the precedents established by the Senate, and, by failing to convene the Legislature of the State, committed a flagrant violation of the Constitution of Pennsylvania.

GEORGE WHARTON PEPPER,
HAMPTON L. CARSON,
GEORGE F. EDMUNDS,
Of Counsel.

APPENDIX

MEMORIAL

of

Republican Members of the Pennsylvania Legislature to the United States Senate

Against the Recognition of the Unconstitutional Appointment of M. S. Quay

To the Honorable the Members of the United States Senate:

GENTLEMEN: We, the undersigned members of the Senate and House of Representatives of the Commonwealth of Pennsylvania, protesting that no man should be allowed to take a seat in the United States Senate from this Commonwealth unless he has a clear and unclouded title, do

Respectfully represent:

The Legislature of Pennsylvania met on the first Tuesday of January, 1899, and, in accordance with the Act of Congress approved July 28, 1866, began balloting on Tuesday January 17, 1899, for the purpose of electing a United States Senator to fill the vacancy caused by the expiration of the term of M. S. Quay, which subsequently occurred March 3, 1899.

The Legislature remained in session, balloting each day in joint convention, until April 20, 1899, without effecting an election, and on that day adjourned *sine die.* The total membership of the Legislature was 253. The last vote preceding the adjournment was, for M. S. Quay, 93; for his opponents, 154, as follows: B. F. Jones, 69; George A. Jenks, 85.

No person having a majority of the votes of those present, the joint convention failed to elect. Immediately thereafter, on April 21, 1899, Governor Stone wrote a letter in which he purported to make a temporary appointment, and named M. S. Quay.

If considerations of party affiliation and sympathy could be supposed to have any weight (as they ought not to have), it would be pertinent to call attention to the fact that upon the question of M. S. Quay's election as Senator, there was opposed to him a majority of the Republican Senators last elected by the people in the several Senatorial districts of the Commonwealth.

Of the 199 votes cast by members of the House (of both parties) on the last ballot preceding adjournment, 128 voted against M. S. Quay and 71 for him.

This vacancy in the representation from Pennsylvania did not happen during the recess of the Legislature, but while the Legislature was in session, and at a time when the Governor had no possible authority to make a temporary appointment, the session of the Legislature having continued for forty-seven days after the expiration of M. S. Quay's term. Article I, Section 3, of the Constitution of the United States, upon which Governor Stone is presumed to have based his appointment of M. S. Quay, provides: "And if vacancies happen, by resignation or otherwise, during the recess of the "Legislature of any State, the Executive thereof may make temporary appointments until the next meeting of the Legislature, which "shall then fill such vacancies."

The right of a Governor to make a temporary appointment to the United States Senate, when the expiration of a Senatorial term happens while the Legislature is in session, in such cases as now exist in Pennsylvania, Delaware, Utah and California, has again and again been denied by your honorable body.

If this were not the rule, a power usurped by a Governor would enable him to force into the Senate some man in direct violation of the will of a majority of the people of a State; a proceeding which would be utterly subversive of the principles upon which our Government is founded.

If a Governor of a State is to be invested with the right to make a Senatorial appointment after the Legislature has had an opportunity to elect and has failed to act, it will inevitably result that efforts will be made by the Executives of the States to gather round themselves a small band of adherents who, holding the balance of power and preventing an election by the Legislature, will deliberately throw into the hands of a Governor the prerogative with which the Constitution of the United States has invested the several Legislatures.

The language of the Constitution of the United States is perfectly clear in letter and spirit in providing that the power of the Executive to appoint can be exercised only when the Legislature has had no opportunity to make the election. At the basis of the constitutional provisions relating to the composition of the Senate lies the conception that it is the Legislatures, representing the people of the States in their separate and free municipal capacities, which shall make the election of the United States Senators, and that the power of the Governors shall be brought into exercise only when the Legislatures have not had an opportunity to act.

This your memorialists confidently assert has been the absolutely uniform rule of the Senate of the United States from the first case to the last that has been brought to its consideration.

In this instance, your memorialists call your attention to an additional reason why the certificate given by Governor Stone should not be recognized.

The Constitution of Pennsylvanla (Article II, Section 4) provides: "In case of a vacancy in the office of United States Senator "of this Commonwealth, in a recess between sessions, the Governor "shall convene the two houses, by proclamation, on notice not "exceeding sixty days to fill the same."

The omission to convene such special session of the Legislature in order to fill the vacancy now existing in the United States Senate from this Commonwealth, without regard to when it happened, is a gross violation of the Constitution of Pennsylvania, and a temporary appointment made under such circumstances is entitled to no consideration whatever.

To overthrow the long line of decisions firmly established in the Senate since the foundation of our Government, and sanction the flagrant disregard of the Constitution of a Commonwealth by its Chief Executive, would be to establish precedents which cannot fail to produce corruption and abuses in National and State politics.

In view of these considerations, we feel confident you will realize the importance of adhering to the provisions of the Constitution of the United States, and of giving no recognition to a temporary appointment made contrary to precedent and in contravention of the Constitution of the United States and of the Commonwealth of Pennsylvania.

William Flinn,	J. Bayard Henry,	C. L. Magee,
David Martin,	Hampton W. Rice,	John W. Crawford,
John S. Weller,	John Dindinger,	Samuel A. Losch,
C. R. Woodruff,	James N. Moore,	Robt. McWhinney,
W. H. Koontz,	F. B. Hargrave,	J. Lewis Srodes,
Frank G. Edwards,	W. D. Wilson,	Geo. M. Hosack,
John F. Keator,	John M. Martin,	Frank J. Klumpp,
Mahlon L. Savage,	Geo. H. Caldwell,	Wm. W. Nisbet,
John B. Rendall,	R. S. Edminston,	Geo. L. McFarlane,
Palmer Laubach,	Edw. D. Wadsworth,	F. L. Snyder,
L. H. R. Nyce	Plummer E. Jefferis,	Henry H. Fetterolf,
James Clarency,	Jason Sexton,	J. H. McLain,
Harry Wilkinson,	W. C. Norton,	Samuel A. Kendall,
Wm. F. Stewart,	James Foster,	J. V. Clark,
Thos. J. Ford,	Wm. P. Winner,	S. D. Robison,
W. W. McElhany,	A. L. Allen,	E. A. Coray, Jr.
Guy P. McCandless,	Samuel Weiss,	J. Alexander,
James McB. Robb,	Charles Shane,	R. Kennedy Young,
Walter Stradling,	Elias Abrams,	L. T. Manley,
H. Clay Chisolm,	Robt. A. Linton,	Nathan C. Mackey.

Analytical Statement of the Senate Election Cases—Comprising Cases reported in Taft's Compilation and those decided since 1891

		A: Cause of Vacancy						B: Occurrence of Vacancy		C: Time of Appointment				D: Limitation of Appointment			The Decision
		Resignation Taking Effect		Death		Expiration of Prior Term		During the Recess of the Legislature	During the Session of the Legislature	Before the Occurrence of the Vacancy		After the Occurrence of the Vacancy		Until a Date Certain During Recess	Until Next Meeting of the Legislature		
		At Once	At a Future Day	Pending Resignation	Otherwise	Vacancy Not Foreseen	Vacancy Foreseen			No Opportunity for Legislative Action in the Interval	Opportunity in Interval for Legislative Action	No Opportunity to Elect Between Occurrence of Vacancy and Appointment	Opportunity to Elect Between Vacancy and Appointment		The Legislature Meets and Elects	The Legislature Adjourns Without Electing	
							Susceptible of Being Provided for in Advance by the Legislature										
1. Kensey Johns	1794	1						1					1				1. Not entitled to the seat, the Legislature having had an opportunity to elect.
2. Uriah Tracy	1801						2	2		2							2. Entitled to the seat, although the occurrence of the vacancy was foreseen.
3. Samuel Smith	1809						3	3				3			3		3. Entitled to the seat till the election of a successor.
4. James Lanman	1825						4	4		4							4. Not entitled: either because the vacancy could have been provided for in advance; or because the appointment was made before the occurrence of the vacancy.
5. Ambrose H. Sevier	1836					5		5		5							5. Entitled, the vacancy not having been foreseen.
6. Robert C. Winthrop	1851	6						6				6			6		6. Entitled to sit until the acceptance of his successor should be notified to the Senate.
7. Archibald Dixon	1852		7	7				7				7		7			7. Entitled to sit only to date named in appointment, at which date an election previously held took effect.
8. Samuel S. Phelps	1853				8			8				8				8	8. Not entitled after the adjournment of the Legislature.
9. Jared W. Williams	1853				9			9				9				9	9. Not entitled after the adjournment of the Legislature.
10. Charles H. Bell	1879						10	10				10					10. Entitled, as the vacancy (though foreseen) could not be provided for in advance.
11. Henry W. Blair	1885						11	11				11					11. Entitled, on the principle applied in (10).
12. Horace Chilton	1891		12					12		12							12. Entitled (though the appointment was made in advance of the vacancy) as the Legislature had no opportunity to act.
13. Lee Mantle	1893						13	13				13					13. Not entitled, the vacancy being foreseen and being susceptible of being provided for in advance.
14. John B. Allen	1893						14*		14*				14*				14. Claim not pressed in view of decision of (13).
15. Ashahel C. Beckwith	1893						15*										15. Claim not pressed in view of provision of (13).
16. Henry W. Corbett	1898						16	16				16					16. Not entitled, the vacancy being foreseen and being susceptible of being provided for in advance.

NOTE.—The cases of Mr. Cocke (1797), Mr. Hindman (1801), Mr. Condit (1803), Mr. Anderson (1809), Mr. Cutts (1813) and Mr. Williams (1817) were analogous to (2) and (3) *supra*. The vacancies in each case occurred in recess and the appointees were seated without objection.

Since 1817 no Governor's appointee has been seated by the Senate where the vacancy, which was the occasion of his appointment, was caused by the expiration of a prior term, which expiration was foreseen and was susceptible of being provided for in advance by the Legislature. On the contrary, in the cases of James Lanman (1825), of Lee Mantle, and Henry W. Corbett, the Senate declined to seat persons appointed under these circumstances, notwithstanding that in each case the vacancy had occurred during the recess of the Legislature, and there had been no opportunity for legislative action in the interval between the occurrence of the vacancy and the making of the appointment.

In Mr. Quay's case the vacancy which Governor Stone undertook to fill was a vacancy which could be foreseen and might have been provided for in advance by the Legislature. If, therefore, Mr. Quay is seated by the Senate, the decision will involve a return to a position abandoned seventy-five years ago, and will involve a reversal of three carefully considered precedents established within that period.

* Not pressed to a vote.

In no case has the Senate ever seated a Governor's appointee where the vacancy which was the occasion of the Governor's temporary appointment occurred while the Legislature of the State was in session. In every one of the cases, from that of Kensey Johns in 1794 to that of Henry W. Corbett, in 1898, it appears that the vacancy occurred during the recess of the Legislature. In the case of John B. Allen and in the case of Ashahel C. Beckwith it appears that the vacancy occurred during the session of the Legislature; but neither of these cases was pressed to a vote, but the claim was abandoned after the Senate decided that Mr. Mantle was not entitled to his seat.

In Mr. Quay's case the vacancy occurred during the session of the Legislature. If he is seated, the Senate will depart from a line of action which has been unbroken since the foundation of the government.

Of all the cases cited above, there is only one (that of Kensey Johns, arising in 1794) in which the Senate was called upon to vote upon the right of a Governor's appointee where a legislative opportunity to elect intervened between the happening of the vacancy in recess and the time of appointment. In that case the question was decided against the claim of the appointee by a decisive vote. In every other case it is a fact that no legislative opportunity had occurred in the interval.

In Mr. Quay's case the Legislature had ample opportunity to elect both before the occurrence of the vacancy and after it; and, therefore, before the date of the Governor's appointment. If Mr. Quay is seated the Senate will necessarily overrule the decision in the Johns case and will recognize the right of a Governor's appointee upon a state of facts which no one has thought worth while to bring to a vote during the hundred years which have elapsed since the Johns case was decided.

In the Phelps case and in the Williams case (cited above) it was decided, after mature consideration, that the person temporarily appointed by the governor on the occasion of a vacancy occurring in recess was not entitled to retain his seat in the Senate after the adjournment of the next session of the State Legislature which had an opportunity to select his successor.

In Mr. Quay's case the Legislature had an opportunity to elect his successor, and adjourned without effecting an election. If the Senate recognizes Mr. Quay's claim, the conclusion will be established that the decision in the Phelps and Williams cases may be nullified by the act of a Governor in re-commissioning his appointee immediately after the Legislature has risen. If he may do this once, he may do it indefinitely; and the State may continue to be represented in the Senate by one who is the mere personal favorite of the Governor, not in political sympathy with either of the great parties or with the views of a majority of the people of his State.

1.	Henry W. Cotpon	1898								
2.	Aspatiel C. Beckwith	1803								
3.	John B. Allen	1803								
4.	Leo Mpurie	1803								
5.	Horace Chilton	1801								15
6.	Henry W. Bisn	1882								
7.	Charles H Bell	1870								
8.	Israel W. Williams	1823								
9.	Samuel S. Apple	1823								
10.	Archibald Dixon	1825								7
11.	Robert C. Winthrop	1821					6			
12.	Thomas H. Sevier	1830								
13.	James Lanman	1832								
14.	Samuel Smith	1809								
15.	Uriah Tracy	1801								
16.	Kearsley Jones	1804					1			

Age at Date	Term of Service	Reelection	Total Effect

Analytical Statement

GEORGE H BUCHANAN & COMPANY
420 SANSOM STREET 420
PHILADELPHIA